U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 06 December 2004

BALCA Case No.: 2004-INA-31
ETA Case No.: P2003-ME-01333778

In the Matter of:

TAKEO KAWAMURA, M.D. & ASSOCIATES,
Employer,

on behalf of

ROY THOMAS HENNEBERRY,
Alien.

Certifying Officer: Raimundo A. Lopez
Boston, Massachusetts

Appearance: Jon A. Haddow, Esquire
Bangor, Maine
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification[1] filed by Takeo Kawamura ("the Employer") on behalf of Roy Thomas Henneberry ("the Alien") for the position of Manager, Office. (AF 34-41).[2] The following decision is based on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

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[1] Alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[2] "AF" is an abbreviation for "Appeal File."

STATEMENT OF THE CASE

On April 2, 2003 the Employer filed an application for alien employment certification on behalf of the Alien for the position of Medical Services Manager, which has been classified as Manager Office. (AF 34). The minimum job requirements included a Bachelors of Science degree, or equivalent, in business, health, or industrial engineering, and two years of experience in the job offered or in the related occupation of business management.

On August 22, 2003, the CO issued a Notice of Findings ("NOF") proposing to deny certification on the basis that the Employer unlawfully rejected an able and qualified U.S. worker. (AF 9-10). Four applicants responded to the newspaper advertisement. Applicant #1 was the only one interviewed, but was not offered the position. (AF 16). Applicant #2, despite the fact that she possessed a Masters of Science degree in business, a Bachelors of Science degree in public accounting, and had four years of business management experience, was not granted an interview. (AF 16, 28-30). The Employer stated on the "Responses to Recruitment" form that Applicant #2 had a "poor resume [on which] no details of past experience" were specified. (AF 16). The CO noted that the employer bears the burden of further investigating an applicant's credentials where his or her resume raises a reasonable possibility that the applicant meets the minimum requirements.

On September 3, 2003, the Employer filed a rebuttal to the NOF asserting that Applicant #2 was rejected because her resume lacked "several key skills greatly needed" to fulfill the position. (AF 8). More specifically, Applicant #2 had "no experience in analyzing or improving company efficiency" as was required according to box 13 (duties) on the ETA 750A. The Employer further stated that Applicant #2's "resume listed no computer skills or experience with information systems," explaining that listing data entry and spreadsheet skills on the resume "does not constitute an understanding of information systems."

On October 7, 2003, the CO issued a Final Determination ("FD") denying certification on the ground that the Employer unlawfully rejected an able and qualified U.S. worker by failing to submit convincing documentation that Applicant #2 was not able to perform the job duties. (AF 3-4). The CO noted that the applicant showed a broad range of experience and education, and the Employer failed to carry its burden to further investigate the applicant's credentials. Applicant #2 was neither contacted nor interviewed. The Employer's rebuttal to the NOF failed to assert that Applicant #2 would not have been able to perform the basic job duties.

On November 10, 2003, the Employer filed a Request for Review and the matter was docketed in this Office on January 13, 2004. The Employer's Request for Review argued that Applicant #2 "clearly did not meet the requirements set forth in the ETA 750[A], parts 13 and 15, according to her resume." (AF 2).

DISCUSSION

Twenty C.F.R. § 656.24(b)(2)(ii) provides: "[t]he Certifying Officer shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed." Where it is apparent from an applicant's resume that the applicant meets the minimum job requirements as identified in box 14 on the ETA 750A, it is incumbent upon the employer to either: (1) submit convincing documentation that the applicant was not able to perform the job duties, or (2) further investigate the applicant's credentials (e.g. interview the applicant). The Employer here has failed to meet either of these requirements.

U.S. applicants who meet the employer's minimum job requirements may not be rejected as unqualified. *Quality Products of America, Inc.*, 1987-INA-703 (Jan. 31, 1989) (*en banc*). Such a rejection is a flagrant violation of 20 C.F.R. § 656.21(b)(6)

which requires employers to "clearly document … that all U.S. workers who applied for the position were rejected for lawful job related reasons." *Id.* An employer unlawfully rejects a U.S. worker who satisfies the minimum requirements specified on the ETA 750A and in the advertisement for the position. *American Cafe*, 1990-INA-26 (Jan. 24, 1991). If the applicant meets the minimum requirements specified on the ETA 750A, he is considered qualified for the position. *Fritz Garage*, 1988-INA-98 (Aug. 17, 1988). Without evidence that the applicant's resume is factually incorrect, an employer is not permitted to merely assert that the applicant is unqualified when the applicant, according to his resume, meets the minimum job requirements. *Vanguard Jewelery Corp.*, 1988-INA-273 (Sept. 20, 1988).

Where a U.S. applicant's resume indicates that he meets the broad range of experience, education, and training required for the job, thus raising the reasonable prospect that he meets all of the employer's stated actual requirements, the employer has a duty to make a further inquiry, by interview or other means, into whether the applicant meets all of the actual requirements. *Gorchev & Gorchev Graphic Design*, 1989-INA-118 (Nov. 29, 1990) (*en banc*); *Nancy, Ltd.*, 1988-INA-358 (Apr. 27, 1989) (*en banc*). Labor certification is properly denied where an applicant's resume lists minimum requirements for the job and the employer's assertion that the applicant is unqualified is not supported by any objective evidence. *A.E.W. North Am., Ltd.*, 1993-INA-471 (Oct. 31, 1994).

The Employer should have contacted the applicant to inquire further about her qualifications. *See, e.g., Dearborn Public Schools*, 1991-INA-222 (Dec. 7, 1993) (*en banc*). The Employer here failed to make such an inquiry and, as such, is unable to prove that an apparently able and qualified U.S. applicant is incapable of performing the basic job duties. It is improper for an employer to reject U.S. applicants who meet the minimum stated requirements. The Employer's contention that the applicants could not perform the stated job duties despite possessing the minimum stated requirements was not objectively detailed and, therefore, the Employer did not meet its burden of proof. *See, e.g., Champion Zipper Corp.*, 1992-INA-174 (Jan. 4, 1994).

The burden of proving that an applicant was not hired for a lawful job-related reason is on the employer. *Cathay Carpet Mills, Inc.*, 1987-INA-161 (Dec. 7, 1988) (*en banc*). The Employer has failed to proffer such a reason for the rejection of this applicant and remains in violation of 20 C.F.R. § 656.21(b)(6). As such, labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.